

# House Rule XII: Congress and the Constitution

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In the early days of January 2011, delivering on a promise from the Republican Pledge to America,<sup>1</sup> the U.S. House of Representatives amended House Rule XII to require that “all measures introduced in the House . . . that are intended to become law”<sup>2</sup> must be accompanied by a document citing “as specifically as practicable the power or powers granted to Congress in the Constitution to enact the” proposed measure.<sup>3</sup> In its entirety, the new rule reads:

7(c)(1) A bill or joint resolution may not be introduced unless the sponsor submits for printing in the Congressional Record a statement citing as specifically as practicable the power or powers granted to Congress in the Constitution to enact the bill or joint resolution. The statement shall appear in a portion of the Record designated for that purpose and be made publicly available in electronic form by the Clerk.

(2) Before consideration of a Senate bill or joint resolution, the chair of a committee of jurisdiction may submit the statement required under subparagraph (1) as though the chair were the sponsor of the Senate bill or joint resolution.<sup>4</sup>

Shortly after the adoption of this new Rule, the Congressional Research Service (CRS) issued an important report providing, among other things, guidance about its scope.<sup>5</sup> Some items were pure housekeeping. The CRS Report, for instance, restates and clarifies some of the limits of the plain text of the new Rule. As the Report highlights, the new Rule applies its mandatory obligations only to new bills and joint resolutions proposed in the House.<sup>6</sup> It is, by contrast, permissive where a Senate bill or joint resolution is taken up, allowing, but not requiring, “the chair of a committee of jurisdiction” to submit

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<sup>1</sup> Republicans in Congress, *A Pledge to America: A New Governing Agenda Built on the Priorities of Our Nation, the Principles We Stand for, and America's Founding Values* (2010) [hereinafter *Pledge to America*], <http://www.gop.gov/resources/library/documents/pledge/a-pledge-to-america.pdf>.

<sup>2</sup> KENNETH R. THOMAS & TODD B. TATELMAN, CONG. RESEARCH SERV., R41548, SOURCES OF CONSTITUTIONAL AUTHORITY AND HOUSE RULE VII, CLAUSE 7(c), at 1 (2011).

<sup>3</sup> H.R. Res. 5, 112th Cong. § 2(a) (2011) (as passed by House, Jan. 5, 2011).

<sup>4</sup> *Id.*

<sup>5</sup> THOMAS & TATELMAN, *supra* note 2, at 1.

<sup>6</sup> *Id.*

the required statement “as though the chair were the sponsor of the Senate” measure.<sup>7</sup>

Among the subtler issues the CRS Report addresses is a crucial feature of the reach of the new Rule. As interpreted in the CRS Report, the Rule incorporates a distinction between what the Report dubs “statements of constitutional authority” and “analys[e]s of constitutionality.”<sup>8</sup> “Statements of constitutional authority,” says the Report, are required where the new Rule applies,<sup>9</sup> while “analys[e]s of constitutionality” are not.<sup>10</sup>

The particular terminology of this distinction may be unfamiliar (it is not found in the text of the new Rule), but the distinction itself, with a little explanation, is easily understood. The CRS Report reads the House Rule to require only a statement referring to

the provision or clause of the Constitution that grants Congress the authority to enact the bill that is being introduced. Phrased another way, the question that the House rule is arguably asking of members is, what part of the Constitution gives Congress the power to act in the manner being proposed.<sup>11</sup>

The articulation of that foundation comprises the sum and substance of the “statement of constitutional authority” said to be required by the new Rule. By negative implication, according to the CRS Report, what “[t]he [new House] rule does not appear to be asking [is] whether the specifics of what the member is proposing in [a] bill [or joint resolution] are consistent with the Constitution” in any other sense.<sup>12</sup> To determine whether a particular bill or joint resolution is or is not ultimately consistent with the Constitution, the Report explains, would require an “analysis of constitutionality,” which is “a separate, often times much more complex inquiry” than what the new Rule contemplates.<sup>13</sup> This is because a full constitutional work-up would presumably entail consideration of whether “particular components of the [proposed] legislation are in fact constitutionally permissible in light of provisions in the Constitution that may place limitations or disabilities on Congress’s authority to act.”<sup>14</sup>

Borrowing an example from the CRS Report in order to put some additional flesh on its distinction between “statements of constitutional authority” and “analyses of constitutionality,” the new House Rule would appear satisfied in

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<sup>7</sup> *Id.*

<sup>8</sup> *See id.* at 2–4.

<sup>9</sup> *Id.* at 2–3.

<sup>10</sup> *Id.* at 3.

<sup>11</sup> THOMAS & TATELMAN, *supra* note 2, at 3.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* There is certainly something to this, though questions of congressional authority, aside from disabilities or limitations on congressional powers, are not always either as simple or straightforward as the contrast in this example could be taken to suggest. For gestures in the CRS Report toward some of the complications, see *id.* at 3–4 (discussing the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010)).

the case of a new bill introduced in the House relating to “the interstate sale and distribution of material related to animal cruelty or depictions of child pornography”<sup>15</sup> when the bill’s sponsor submits a “statement of constitutional authority” citing the Commerce Clause of the U.S. Constitution as the basis for this would-be exercise of legislative power.<sup>16</sup> That, the authors of the CRS report think, is all it takes. By extension, the Rule appears to demand no additional analysis of whether the proposed legislative measure conflicts with, for example, the First Amendment or any other constitutional provision. Finishing the point, the CRS Report announces in general terms that:

The consideration of constitutional limitations or disabilities on Congress’s authority, such as the First, Ninth, and Tenth Amendments, appears to be outside the scope of the House rule. The House rule arguably only requires the members to state the constitutional basis for authority to act, not whether the action is constitutionally permissible in light of other potentially disabling or limiting provisions.<sup>17</sup>

Once the distinction between “statements of constitutional authority” and “analyses of constitutionality” is understood, it is possible to begin generating defenses of it. After all, in some sense it functionally traces a standard distinction every student of American constitutional law learns: Congress, being within our system an institution of enumerated, hence limited, powers, every legislative action it undertakes must be supported by some affirmative grant of constitutional authority—whether express or implied.<sup>18</sup> The new House Rule simply calls for this affirmative grant of authority to be specifically referred to in a special document, now being collected and published in the *Congressional Record*. The statement the Rule requires need not also include a discussion of whether a proposed bill or joint resolution originating in the House, if passed pursuant to some affirmative grant of enumerated constitutional powers, nevertheless would violate some other constitutional limitation or prohibition, hence whether the courts will ultimately uphold or strike it down if and when challenged on constitutional grounds.

Beyond the generally familiar dimensions of the distinction, there are more particular and powerful reasons for reading the new House Rule the way the

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<sup>15</sup> *Id.*

<sup>16</sup> U.S. CONST. art. I, § 8, cl. 3.

<sup>17</sup> THOMAS & TATELMAN, *supra* note 2, at 3.

<sup>18</sup> See e.g., *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819) (“We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.”).

CRS Report does. Among other things, the CRS's understanding of the new Rule minimizes the burdens it adds to the legislative process. Comparatively, it generally seems easier, not to mention quicker, to cite a constitutional provision or even multiple constitutional provisions that would seem to authorize a particular piece of legislative action than to engage in a full-blown analysis of the constitutionality of a proposed (or more exactly, a to-be-proposed) legislative measure that might, to be complete, have to consider all the reasonable constitutional arguments for and against it. If not checked in the ways the CRS Report proposes, the new Rule might become quite expensive in terms of the institutional resources it consumes. As the CRS Report notes, the Clerk of the House "appears to have the authority to reject"<sup>19</sup> new bills or joint resolutions that fail to supply the required "statement of constitutionality."<sup>20</sup> Merits aside, if the statement required full-blown constitutional analysis of each and every proposed measure, when and how, and based on what, would the Clerk (or her staff) know enough was enough? How would the Clerk (or her staff) vet the analysis submitted? Would any constitutional analysis, however idiosyncratic, perfunctory, or unpersuasive, be held to suffice?<sup>21</sup>

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<sup>19</sup> THOMAS & TATELMAN, *supra* note 2, at 1.

<sup>20</sup> *Id.*

<sup>21</sup> Now, anyway, it may be. *Id.* ("[T]he rule does not appear to vest the House Clerk with the responsibility or authority to evaluate the substantiality of the required statement."); *id.* at 2 ("The rule appears to adopt a subjective standard for determining what specific constitutional authority exists to enact an introduced bill."). At this point in the Rule's operation, any citation appears to suffice, even when it runs to sources not conventionally seen as granting Congress direct legislative powers. *See id.* (providing a sampling of "permissible sources for members to rely on," which includes "James Madison's *Notes on the Constitutional Convention of 1787*[,] . . . the *Federalist Papers*, *Anti-Federalist Papers*, . . . Joseph Story's *Commentaries on the Constitution of the United States* or *The Heritage Guide to the Constitution*; academic journal articles, constitutional law treatises, and other publications"). At most, these sources seem relevant for the light they help shed on what the Constitution means. For examples of statements of constitutional authority that appear to do the job, if somewhat subjectively, see 157 CONG. REC. H44 (daily ed. Jan. 5, 2011) (statement of Rep. Bachmann) ("Congress has the power to enact this legislation [H.R. 87] pursuant to the following: This bill makes specific changes to existing law in a manner that returns power to the States and to People, in accordance with Amendment X to the U.S. Constitution."); *id.* at H45 (statement of Rep. Holt) ("Congress has the power to enact this legislation [H.R. 131] pursuant to the following: Article I of the Constitution of the United States."); *id.* at H46 (statement of Rep. Paul) ("Congress has the power to enact this legislation [H.R. 151] pursuant to the following: The constitutionality of the seniors' Health Care Freedom Act is the Fifth Amendment to the United States Constitution, which protects American citizens from having their rights to life, liberty or property abridged without due process of law. Forcing seniors into a federal program they do not want, and fording them from forming private contracts, violates their right to liberty and property."); *id.* at H396 (daily ed. Jan. 20, 2011) (statement of Rep. Pitts) ("Congress has the power to enact this legislation [H.R. 358] pursuant to the following: The Protect Life Act would overturn an unconstitutional mandate regarding abortion in the Patient Protection and Affordable Care Act."); *id.* at H511 (daily ed. Jan. 26, 2011) (statement of Rep. Deutch) ("Congress has the power to enact this legislation [H.R. 484] pursuant to the following: The

And there are other considerations that recommend the CRS's reading of the new House Rule as requiring only statements—not analyses—of constitutional authority. The CRS's reading shows a marked tendency to preserve a well-established division of responsibility between Congress and the courts in our constitutional scheme. Consistent with this traditional view, Congress makes the laws that the courts interpret and review for constitutional conformity.<sup>22</sup> The CRS's understanding of the new House Rule keeps the allocation of tasks largely, if not entirely, intact. Pursuant to the new House Rule, while the sponsor of a new bill or joint resolution originating in the House must submit the required constitutional authorization statement, the House itself is not ordered to make any collective judgment about it. Institutionally, the obligation to assess constitutionality—both Congress's authority to pass a particular piece of legislation, as well as its conformity with the cited provision and the remainder of the Constitution—remains fully docked at the courts. Nor does the new House Rule by its terms purport to tell the courts how they ought to treat the statements it requires. Courts might give them some heed or dismiss them entirely—whatever the courts decide.<sup>23</sup> Understood this way, the new

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First Amendment of the United States Constitution.”); *id.* at H1363 (daily ed. Feb. 18, 2011) (statement of Rep. Kucinich) (“Congress has the power to enact this legislation [H.R. 808] pursuant to the following: The preamble to the Constitution has the following injunction: ‘ . . . to promote domestic tranquility . . . [.]’ This is the purpose of the bill.”); *id.* at H3219 (daily ed. May 11, 2011) (statement of Rep. Paul) (“Congress has the power to enact this legislation [H.R. 1831] pursuant to the following: This act is justified by the Commerce Clause of the United States Constitution that, by granting Congress the power to regulate commerce among the several states, allows Congress to prevent the federal government from interfering in Americans’ ability to grow and process industrial hemp and by the Ninth Amendment and Tenth Amendment of the United States Constitution that recognizes that rights and powers are retained and reserved by the people and the states.”); *id.* at H4328 (daily ed. June 16, 2011) (statement of Rep. Polis) (“Congress has the power to enact this legislation [H.R. 2211] pursuant to the following: Article I, Section I. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.”); *id.* at H4749 (daily ed. July 7, 2011) (statement of Rep. Cravaack) (“Congress has the power to enact this legislation [H.R. 2442] pursuant to the following: This bill is enacted pursuant to Amendment X of the Constitution of the United States.”).

<sup>22</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803), is, of course, a conventional source citation for the view, though authorities reflecting the idea are legion. *But see* JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 4 (1980) (“Of course courts make law all the time[.] . . . [O]utside . . . constitutional adjudication, they are either filling in gaps the legislature has left in the laws it has passed or, perhaps, taking charge of an entire area the legislature has left to judicial development.”); *cf. id.* at 131 (“In theory it is the legislature that makes the laws and the administrators who apply them. Anyone who has seen Congress in action, however . . . will know that the actual situation is very nearly upside down.”).

<sup>23</sup> *Cf.* THOMAS & TATELMAN, *supra* note 2, at 2 (noting that upon inclusion of a statement of constitutional authority, “the rule is satisfied and members have no legal or procedural recourse against a statement, even if they believe the constitutional authority statement is incomplete, inaccurate, or improper”).

House Rule mounts no challenge to the notion that “[i]t is emphatically the province and duty of the [courts] to say what the law [(including constitutional law)] is,”<sup>24</sup> capped, since *Marbury v. Madison* and more recently *Cooper v. Aaron*, by what the Court says being the final say.<sup>25</sup>

But as persuasive as the CRS’s reading of the new House Rule is, and notwithstanding the defenses of it that can readily be produced, it is anything but the only way the Rule may be interpreted. To its credit, the CRS Report carefully flags and effectively concedes this point in various ways. When offering its reading, it repeatedly emphasizes that its understanding is only what the Rule “appears” or “arguably” or “could” or “may” be understood—not what it absolutely and unequivocally must be understood—to mean.<sup>26</sup>

How else might the House Rule be understood? Begin, as the Rule’s text itself suggests, with the concern about “the power or powers granted to Congress in the Constitution to enact” legislation that animates it.<sup>27</sup> Given this concern, it might well be regarded as useful, if not more (something akin to indispensable), to know just how far Congress’s constitutional powers go in relation to a particular bill or joint resolution. And to know that, of course, one might like to know more than simply what provision or provisions of the Constitution might initially seem to justify a particular piece of proposed legislation as a legitimate exercise of Congress’s constitutional powers. One might also like to know, for instance, whether and how Congress’s powers have been amplified or limited, whether internally or in relation to the balance of the Constitution’s text.<sup>28</sup>

If so, the CRS Report’s distinction between “statements of constitutional authority” and “analyses of constitutionality,” however sensible and well intentioned, seems slightly off the mark. If the new House Rule means to deliver some assurances that Congress has the power to enact a particular measure, statements of constitutional authority may be partial or incomplete—

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<sup>24</sup> *Marbury*, 5 U.S. (1 Cranch) at 177.

<sup>25</sup> *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (“This decision [in *Marbury*] declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system.”).

<sup>26</sup> THOMAS & TATELMAN, *supra* note 2, at 1 (“the House Clerk appears to have the authority,” “rule does not appear to vest,” “it appears that these statements,” “the rule appears to only apply”); *id.* at 2 (“there appears to be nothing that prevents,” “rule appears to adopt a subjective standard,” “the rule appears to leave each individual,” “that appears to be permissible,” “permissible sources for members to rely on could include,” “language ‘as specifically as practicable’ suggests,” “rule does not appear to,” “the Clerk appears to have the ability,” “authority does not appear to provide”); *id.* at 3 (“House rule is arguably asking,” “rule does not appear to be asking,” “appears to fully satisfy,” “appears to be outside the scope,” “House rule arguably only requires,” “Congress may be able to rely”).

<sup>27</sup> H.R. Res. 5, 112th Cong. § 2(a) (2011) (as passed by House, Jan. 5, 2011).

<sup>28</sup> “Internal limitations” are actively imagined here to be internal to a cited constitutional provision and in contradistinction to external limitations found elsewhere in the Constitution’s text.

certainly, sometimes they will be—without any analysis of the measure’s constitutionality. A statement of constitutional authority, without more, may—and in some instances, will—thus be insufficient, or worse: misleading, making it seem as though Congress has the constitutional authority to enact a particular bill or joint resolution when it, in fact, does not.<sup>29</sup>

To see why this is so, imagine a proposed bill in the House that cites the Commerce Clause in its statement of constitutional authority even though, by all reasonable agreement, the proposal exceeds Congress’s Commerce Clause powers read in light of the Constitution’s Necessary and Proper Clause.<sup>30</sup> A citation to the Commerce Clause under these circumstances would appear to be the emptiest way of satisfying the new House Rule, elevating form over substance, and for what? Where is the respect for the metes and bounds of Congress’s constitutional powers in that? Or think of a House bill proposing to ban the burning of American flags that have been part of interstate commerce. Would a simple cite to the Commerce Clause be enough to acknowledge the existing limits of Congress’s authority to enact this legislation?<sup>31</sup> If the new House Rule is to be taken seriously—as its status as a House Rule suggests it ought to be—shouldn’t some reference to the First Amendment also be made, suggesting that the proposed legislation can be squared with it, and maybe a few words at least about how?

Stepping back from these examples, it appears that for statements of constitutional authority to be a meaningful exercise in the direction of getting Congress to take its constitutional obligations—including the constitutional limitations on its powers—to heart, a statement of constitutional authority, at least sometimes, should include some account, however brief, of how Congress’s power to enact a particular bill or joint resolution actually supports the measure at hand—an account that may, however fleetingly, have to engage the complex fabric of both the internal and the external limitations on Congress’s enumerated powers. But when that is what a statement of constitutional authority looks like and does, it can no longer be neatly distinguished from an analysis of constitutionality, because that is, in effect, what it will have become.

It is no small matter nor is it any coincidence that a broader and more ambitious interpretation of the new House Rule, according to which it may, at least sometimes if not always, require an analysis of constitutionality, can with little effort be squared with the Republican Pledge to America that helped bring the Rule about. According to its terms, the Republican Pledge was not so much aimed at preserving the congressional status quo as it was aimed at changing it,

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<sup>29</sup> It is true that this may be just a sponsor’s view, but the capacity of a statement of constitutional authority to produce these effects remains.

<sup>30</sup> U.S. CONST. art. I, § 8, cl. 18.

<sup>31</sup> See *Texas v. Johnson*, 491 U.S. 397, 406 (1989) (declaring expressive physical desecration of the U.S. flag protected by the First Amendment); see also *United States v. Eichman*, 496 U.S. 310, 312 (1990) (invalidating the Flag Protection Act of 1989, Pub. L. No. 101-131, 103 Stat. 777, as inconsistent with the First Amendment).

minimally in the following, relevant respect. “For too long,”<sup>32</sup> the Pledge trumpets:

Congress has ignored the proper limits imposed by the Constitution on the federal government. Further, it has too often drafted unclear and muddled laws, leaving to an unelected judiciary the power to interpret what the law means and by what authority the law stands. This lack of respect for the clear Constitutional limits and authorities has allowed Congress to create ineffective and costly programs that add to the massive deficit year after year. We will require each bill moving through Congress to include a clause citing the specific constitutional authority upon which the bill is justified.<sup>33</sup>

Crediting these sentiments, rather than treating them as political pabulum (as many have<sup>34</sup>), the requirement contemplated by the Pledge to America—to “require each bill moving through Congress to include a clause citing the specific constitutional authority upon which the bill is justified”<sup>35</sup>—is driven by a conviction that Congress has not taken the constitutional limits on its powers seriously enough. This failure is demonstrated by the ways in which Congress has too often left it to “an unelected judiciary”<sup>36</sup> to determine, among other things, “by what authority”<sup>37</sup> a “law [Congress has passed] stands.”<sup>38</sup> This abdication of responsibility by Congress, the Pledge promises, is to come to an end. The new House Rule is supposed to help deliver on that.

This being the case, the new House Rule might be thought better-suited to helping achieve these larger purposes if it were not understood as only requiring references to the sources of constitutional authority for legislative actions, but also, where appropriate, to demand some statement, however brief and to the point, analyzing their constitutionality. Reading the CRS Report, and recalling that the Pledge to America was meant to appeal to not only a few Tea Partiers<sup>39</sup> and other Tenters<sup>40</sup> in the Republican crowd, it has to be regarded as something of a defeat for them to encounter the CRS’s conclusion that citations

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<sup>32</sup> *Pledge to America*, *supra* note 1, at 33.

<sup>33</sup> *Id.*

<sup>34</sup> See *infra* notes 48–50.

<sup>35</sup> *Pledge to America*, *supra* note 1, at 33.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> See *About Tea Party Patriots: Our Mission*, TEA PARTY PATRIOTS, <http://www.teapartypatriots.org/about> (last visited Nov. 21, 2011); TEA PARTY.NET, <http://www.theteaparty.net> (last visited Nov. 21, 2011).

<sup>40</sup> See *About the Tenth Amendment Center*, TENTH AMENDMENT CTR., <http://www.tenthamendmentcenter.com/about/> (last visited Nov. 21, 2011) (describing the Tenter movement); see also, e.g., Ed Hornick, ‘Tenter’ Movement Aims to Put Power Back in States’ Hands, CNN (Feb. 10, 2010, 8:25 AM), <http://www.cnn.com/2010/POLITICS/02/10/tenth.amendment.movement/index.html?iref=allsearch>.



to the Tenth Amendment are outside the new House Rule's reach,<sup>41</sup> because that Amendment is, if anything, a limitation on, not a source of, congressional powers.

Arguably, then, the CRS's understanding of the new House Rule, which has been widely though not universally accepted as a matter of congressional practice,<sup>42</sup> gets its normative inflection wrong, and perhaps somewhat backward. Consistent with the CRS's reading, statements of constitutional authority submitted pursuant to the new House Rule are to focus all their attention only on those constitutional provisions authorizing congressional actions, and not on any provision that would circumscribe Congress's powers. This, when the point of bringing the new Rule into being was, in part, to raise congressional consciousness about the limits of its constitutional authority. A broad interpretation of the new House Rule—one that does not exclude, but includes constitutional analyses of proposed legislation, at least where constitutional arguments are reasonably predictable, given existing constitutional rules—thus appears better to serve the purpose of encouraging Congress to constrain itself by “adher[ing] to the Constitution,”<sup>43</sup> paying its limitations their due respects, in just the ways the Pledge to America pledged.<sup>44</sup>

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<sup>41</sup> THOMAS & TATELMAN, *supra* note 2, at 3. Disappointing for some, but not all. Not everyone has been daunted. *See, e.g.*, 157 CONG. REC. H44 (daily ed. Jan. 5, 2011) (statement of Rep. Bachmann); *id.* at H3109 (daily ed. May 5, 2011) (statement of Rep. Garrett); *id.* at H3219 (daily ed. May 11, 2011) (statement of Rep. Paul); *id.* at H4749 (daily ed. July 7, 2011) (statement of Rep. Cravaack); *id.* at H5936 (daily ed. Sept. 2, 2011) (statement of Rep. Quayle); *id.* at H6181 (daily ed. Sept. 14, 2011) (statement of Rep. Culberson); *id.* at H6272 (daily ed. Sept. 20, 2011) (statement of Rep. Matheson); *id.* at H6921 (daily ed. Oct. 13, 2011) (statement of Rep. Garrett).

<sup>42</sup> *See, e.g.*, 157 CONG. REC. H42 (daily ed. Jan. 5, 2011) (statement of Rep. McIntyre) (“Congress has the power to enact this legislation [H.R. 27] pursuant to the following: Article I, Section 8, Clause 3 of the United States Constitution.”); *id.* at H43 (statement of Rep. Conyers) (“Congress has the power to enact this legislation [H.R. 40] pursuant to the following: Pursuant to Section 5 of the Fourteenth Amendment to the United States Constitution, Congress shall have the power to enact appropriate laws protecting the civil rights of all Americans.”); *id.* at H44 (statement of Rep. Blackburn) (“Congress has the power to enact this legislation [H.R. 102] pursuant to the following: Article I, Section 8, Clause 3 and Article I, Section 8, Clause 14. . . .”); *id.* (statement of Rep. Burton) (“Congress has the power to enact this legislation [H.R. 105] pursuant to the following: Clause 1, Clause 3, and Clause 18 of Section 8 and Clause 7 of Section 9 of Article I of the United States Constitution and Amendment XVI of the United States Constitution.”); *id.* at H202 (daily ed. Jan. 12, 2011) (statement of Rep. Norton) (“Congress has the power to enact this legislation [H.R. 265] pursuant to the following: Article IV, Section 3, Clause 1 of the Constitution.”).

<sup>43</sup> *Pledge to America*, *supra* note 1, at 33.

<sup>44</sup> Though referred to here as a “broad interpretation of the new House Rule,” this characterization is relative to the narrower reading urged by the CRS Report. An even broader reading of the new House Rule might always require some analysis of constitutionality.

Of course, interpreted this way, the new House Rule would be considerably more far-reaching than it is in the pages of the CRS Report, or, for that matter, what actual congressional practice with it has generally been.<sup>45</sup> Just so, understood this way, the new Rule could be an effective starting point for a substantially new way for the House, and perhaps for Congress as a whole, to undertake its legislative business.<sup>46</sup> If one can conceive of it, congressional deliberations on the merits of proposed legislation might not or might no longer be, as they now are, so regularly focused on first-order policy arguments. To pass muster in the House, proposed legislation might, before too long, also have to satisfy the House's, if not also the Senate's, institutional judgment about the policy options the Constitution allows, or maybe even in some instances, requires, Congress to avail itself of.<sup>47</sup>

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<sup>45</sup> Compare sources cited *supra* note 42, with sources cited *infra* note 47.

<sup>46</sup> Though one could imagine a rule similar to the new House Rule being adopted by the Senate, there is no reason its operation there would have to be the same as in the House. It is possible to imagine, for instance, the House Rule carrying the meaning of it found in the pages of the CRS Report, while in the Senate, the broader and more ambitious reading being discussed here might prevail.

<sup>47</sup> For some statements made pursuant to the new House Rule that may begin to move in these directions, see 157 CONG. REC. H42 (daily ed. Jan. 5, 2011) (statement of Rep. Garret) ("Congress has the power to enact this legislation [H.R. 21] pursuant to the following: This bill seeks to strike a provision from the Patient Protection and Affordable Care Act, the so-called 'individual mandate,' which is unconstitutional. The Patient Protection and Affordable Care Act requires individuals to purchase private health insurance—health insurance that has been approved by the federal government—or pay a fine. While Congress is granted the authority to 'regulate commerce . . . among the several states,' and the Supreme Court has allowed Congress to regulate and prohibit 'economic' activities that are not, strictly speaking, commerce, this is the first time in our nation's history that Congress has sought to regulate inactivity. And for the first time, Congress has mandated that individuals purchase a private good, approved by the government, as the price of citizenship. This requirement is plainly unconstitutional, and, as Federal District Court Judge Henry Hudson recently wrote in his opinion striking down the individual mandate, 'is beyond the historical reach of the Commerce Clause.'" (omission in original)); *id.* at H470 (daily ed. Jan. 25, 2011) (statement of Rep. Price) ("Congress has the power to enact this legislation [H.R. 414] pursuant to the following: Congressional power to provide for public financing of presidential campaigns arises under the General Welfare Clause, Art. I, Sec. 8, of the Constitution. In *Buckley v. Valeo*, 424 U.S. 1, 91 (1976), the Supreme Court upheld the congressional power to enact public financing of presidential elections under this Clause. The Supreme Court stated [this] with regard to the provisions in the Federal Election Campaign Act Amendments of 1974 establishing a presidential public financing system . . ."); *id.* at H681–82 (daily ed. Feb. 10, 2011) (statement of Rep. Rush) ("Congress has the power to enact this legislation [H.R. 611] pursuant to the following: [']The Congress shall have Power [. . .] To regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes.['] U.S. Const., Art. I, Sec. 8, Cl. 3. More specifically, the Interstate Commerce Clause—the second of the three enumerated commerce clause powers that the Constitution confers upon Congress—serves as the constitutional basis for this legislation. Further, per the landmark U.S. Supreme Court case, *Griswold v. Connecticut* (1965), the Court held that the Constitution protects an individual's right to privacy, which is contained in the 'penumbras' and 'emanations' of other constitutional protections. Three of

At this point in the discussion, the new House Rule, no longer subject to dismissal as an empty partisan gesture,<sup>48</sup> mere symbolism,<sup>49</sup> nor simply a

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the concurrences to the majority *Griswold* opinion based the right to privacy on both the Ninth Amendment and the due process clause found in the Fourteenth Amendment. Finding such support in the Fourteenth Amendment is notable, in part, as at least ten (10) states (AL, AZ, CA, FL, HI, IL, LA, MO, SC, WA) expressly recognize a person's right to privacy in their own state constitutions. Elected federal public officials, federal and state policy makers, industry, consumer and privacy advocacy groups all agree that personal privacy of consumer information must be protected in order for e-commerce business models and businesses (in particular), which make use of Internet- and intranet-based platforms and networks to be successful and sustainable.").

<sup>48</sup> *Van Hollen Blasts House Republicans for Breaking Another 'Pledge' "We Will Require that Every Bill Contain a Citation of Constitutional Authority. We Will Give All Representatives and Citizens at Least Three Days to Read the Bill Before a Vote."* [A Pledge to America], STATES NEWS SERV., Sept. 29, 2010 ("House Republicans promised in their 'Pledge to America' that they would do two things procedurally—allow the American people to see legislation 72 hours prior to a vote and include a citation of Constitutional authority in all legislation. But today they made public a 21 page motion to recommit to the 9/11 Health and Compensation Act less than an hour before a vote, and it contains no reference to Constitutional authority. This is just more of the same from Washington Republicans, who are apparently more concerned with scoring partisan political points than keeping their promises to the American people."); cf. Letter from Rep. Henry A. Waxman, Ranking Member, Energy & Commerce Comm., and Rep. Frank Pallone, Jr., Ranking Member, Health Subcomm., to Rep. Fred Upton, Chairman, Comm. on Energy & Commerce (Feb. 11, 2011), available at <http://democrats.energycommerce.house.gov/index.php?q=news/Waxman-and-pallone-urge-upton-not-to-consider-hr-358-until-it-includes-citation-of-constitution>, reprinted in *Waxman and Pallone Urge Upton Not to Consider H.R. 358 Until It Includes Proper Citation of Constitutional Authority*, STATES NEWS SERV., Feb. 11, 2011 ("This bill, which is an attack on a woman's right to choose, was introduced without a valid statement of constitutional authority as required under the new House rules adopted in January. We respectfully urge that the bill not be considered in Committee unless it is re-introduced with a proper citation of constitutional authority. . . . We do not dispute Chairman Pitts's ruling or the parliamentary advice you gave him. But we believe that if the Committee adheres to this policy, it will make a mockery of the rule requiring submission of a statement of constitutional authority. According to the Parliamentarians, the chair judges only whether a constitutional statement has been submitted at the time of introduction, not whether the statement is valid. If members cannot raise a point of order to enforce the constitutional statement rule during committee consideration of the rule, there is no point at which the rule can be enforced. Chairman Pitts's bill is an assault on a woman's access to abortion services. Its apparent objective is to make it impossible for women to choose an abortion by effectively eliminating coverage for the necessary medical services. It also calls into question the obligation of health care providers to provide the emergency services needed to save the life of a pregnant woman. Because the bill represents a federal intrusion into the most intimate personal decisions of women and families, it is exactly the type of legislation that most needs a clear statement of Congress's constitutional authority. While we do not dispute that you have the right to bring H.R. 358 before the full Committee, we respectfully suggest that you use your discretion not to do so. You should ask Mr. Pitts to introduce a new bill with a valid statement of constitutional authority and use the new bill, not H.R. 358, as the vehicle for any further consideration of this matter in the Committee. That would send a strong signal that the Committee is serious about the requirement that the

joke,<sup>50</sup> might begin to engender some determined opposition. From a certain vantage point, a broad reading of the House Rule might appear to drive in the direction of testing separation of powers ideals, with the House, if not the whole Congress, performing the analytic and adjudicative functions of constitutional review conventionally associated in our legal system with the courts.<sup>51</sup> The more the House, or more, Congress as a whole, undertakes to make concrete, independent judgments about the constitutionality of its actions, the more it may be seen to intrude into, and even to pressure, maybe even threaten to supplant, the constitutional prerogatives and authority of the judicial department.<sup>52</sup> All the more so given that congressional judgments about constitutionality and constitutional analysis are ostensibly backed by what might loosely be deemed

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constitutional basis of legislation be clearly stated before legislation can be considered in Committee.”).

<sup>49</sup> Abby Brownback & Louis Jacobson, *Lawmakers Abiding by New Constitutional Justification Rule*, ST. PETERSBURG TIMES (Mar. 18, 2001), <http://www.politifact.com/truth-o-meter/promises/gop-pledge-o-meter/promise/665/require-bills-to-include-a-clause-citing-its-autho/> (“So Republicans and Democrats are following the new rule. But has there been any impact on how the House operates? Experts in congressional procedure say the impact is only symbolic. They agreed that the Republicans have kept their promise, even in judgment-call cases like Pitts’ justification. But the experts added that they didn’t think statements like these are especially meaningful, since the justifications—like many arguments about the Constitution itself—are matters of interpretation. ‘Frankly, this is just symbolic, so I have no real feelings one way or the other,’ said Norman Ornstein, a congressional scholar at the conservative American Enterprise Institute. ‘Of course, you could offer a bill that repeals the Internal Revenue Code, or Medicare, by claiming it is unconstitutional as your basis, and be utterly wrong. But what difference does it really make? You can also justify almost any bill you want by claiming a broad constitutional authority under the health and welfare clause or the commerce clause. So I see the disagreements here as being just as symbolic as the promise in the first place.’”).

<sup>50</sup> David Weigel, *Because We Say So: How Republicans Are Explaining the Constitutionality of Every Bill They Introduce*, SLATE (Mar. 23, 2011, 7:46 PM), <http://www.slate.com/id/2289166/> (quoting Sandy Levinson saying “[n]o lawyer takes this seriously”).

<sup>51</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). “Might appear,” of course, because each branch of government is within its rights, even obligations, to assess the constitutionality of its own actions. See 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 3-4, at 264–67 (3d ed. 2000); see also, e.g., Letter from Eric J. Holder, Jr., Att’y Gen., to John A. Boehner, Speaker, U.S. House of Representatives 5 (Feb. 23, 2011) (concluding unconstitutional the Defense of Marriage Act, Pub. L. No. 104-199, § 3, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (2006))).

<sup>52</sup> See *Marbury*, 5 U.S. (1 Cranch) at 177; see also ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AND THE BAR ON POLITICS* 263 (Yale Univ. Press 2d ed. 1986) (1962) (“Mr. Vinson and others could urge also that constitutional decision is the province of the Court, which Congress should not usurp by voting this bill down on the basis of its own view of its unconstitutionality.”). To be clear, this is not an affirmative argument for this position, only a distillation of a particular logic associated with conventional ideals of judicial review.

democratic bona fides.<sup>53</sup> Should these judgments embrace the rules of reason and principles laid down in Supreme Court precedents,<sup>54</sup> picking up, for instance, where Supreme Court doctrines, as they exist, leave off, and engaging the same methods of reasoning and reason-giving followed by the Court, by what authority could the Court challenge or supplant them? At the very least, these congressional judgments of constitutionality coming from a co-equal branch of government would look to be entitled to some degree of deference and respect.<sup>55</sup> It is one thing, after all, for the courts to make judgments of constitutionality when Congress does not, or, when it does, when Congress has simply been guessing about what the courts are likely to do.<sup>56</sup> It is not obvious why courts should defer to legislative assessments about what they will do rather than simply doing what they will. But it would be something else again for the courts, including the Supreme Court, to substitute their judgments for Congress's where Congress has made a considered constitutional judgment for itself, particularly if it has taken the responsibilities of constitutional deliberation seriously,<sup>57</sup> measured by Supreme Court practice and consistent with the constitutional oath its members swear.<sup>58</sup>

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<sup>53</sup> Unlike judicial decisions striking down legislation on constitutional grounds, which are often said to present "counter-majoritarian" difficulties, BICKEL, *supra* note 52, at 17–20, congressional legislation arguably has, by definition, democratic support. Needless to say, the safer point of view is to limit this to the theory of the system or comparative judgments grounded in its actual practice. For a classic effort that fills in some of the lines, see Jesse Choper, *The Supreme Court and the Political Branches: Democratic Theory and Practice*, 122 U. PA. L. REV. 810, 817–30 (1974).

<sup>54</sup> See Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 19 (1959).

<sup>55</sup> Deference is already sometimes demonstrated by the Supreme Court through the constitutional avoidance canon. See, e.g., *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 500 (1979) (citing *Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804)) ("[A]n Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available."); *United States v. Witkovich*, 353 U.S. 194, 201–02 (1957) (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)) ("When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.").

<sup>56</sup> This is common enough. Legislative judgments about constitutionality are regularly based on readings and understandings of the meaning of judge-made constitutional law, or predictions about what courts will do. See, e.g., *Gun-Free School Zones Act of 1990*, Pub. L. No. 101-647, 104 Stat. 4844, *invalidated in* *United States v. Lopez*, 514 U.S. 549 (1995).

<sup>57</sup> Few can forget the sting of the Supreme Court's decision in *United States v. Morrison*, 529 U.S. 598 (2000), which flyspecked and ultimately deemed constitutionally inadequate the factual and rational predicate for the Violence Against Women Act, 42 U.S.C. § 13981 (1994), that Congress painstakingly and exhaustively laid out, not only meeting but exceeding the rules of then-existing Supreme Court precedents. A more recent example may be the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), *invalidated by* *Florida ex rel. Att'y Gen. v. U.S. Dep't of Health & Human Servs.*, 648 F.3d 1235, 1294 & n.98, 1328 (11th Cir. 2011), *upheld by* *Seven-Sky v. Holder*, No. 11-5047, 2011 WL 5378319, at \*1 (D.C. Cir. Nov. 8, 2011), and *Thomas More Law*

And, truth be told, it is not only those invested in preserving our current institutional arrangements for considering and deciding constitutional questions who might be wary of the possibility that the new House Rule could precipitate these sorts of institutional changes on Capitol Hill. Even those conservatives,<sup>59</sup> who, along with a growing number of progressives,<sup>60</sup> have—if for very different reasons—actively begun imagining a different and diminished role for courts and a correspondingly increased role for the Congress in our constitutional system, might greet the prospects of the new House Rule serving as a vehicle for bringing about some of the more ambitious institutional changes they seek with feelings that are not unmixed.

Perhaps it is easier to articulate the worry from a progressive perspective, but to see it, one has to understand what some progressives think may be gained from what Robin West, with others, has been calling a “legislated Constitution.”<sup>61</sup> At the risk of oversimplification and thus distortion, one version of the basic notion is that our judicially administered, negative Constitution is in some sense basically hostile to legislation, seeing it as always potentially disturbing an equilibrium found in the status quo that is, broadly speaking, constitutionally imagined to respect freedom.<sup>62</sup> Through the

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*Ctr. v. Obama*, 651 F.3d 529, 549 (6th Cir. 2011), in which Congress expressly found that the “individual responsibility requirement . . . is commercial and economic in nature, and substantially affects interstate commerce.” § 1501, 124 Stat. at 242–43.

<sup>58</sup> U.S. CONST. art. VI, cl. 3; *see also* 5 U.S.C. § 3331 (2006) (oath of office).

<sup>59</sup> *See, e.g.*, Edwin Meese III & Rhett DeHart, *Reining in the Federal Judiciary*, 80 JUDICATURE 178, 178 (1997) (“Federal judges have strayed far beyond their proper functions of interpreting and clarifying the law . . .”); Edwin Meese, III, *The Supreme Court of the United States: Bulwark of a Limited Constitution*, 27 S. TEX. L. REV. 455, 465 (1986) (“A constitution that is viewed as only what the judges say it is, is no longer a constitution in the true sense of the term.”).

<sup>60</sup> *See, e.g.*, Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L.J. 330, 340 (2006) (“[T]he legislated Constitution, in contrast to the adjudicated Constitution, is not ‘narrowly legal’ but rather dynamic, aspirational, and infused with ‘national values and commitments.’”); *id.* at 341 (Liu “contemplates wide policymaking discretion for Congress.”); Robin West, *Progressive and Conservative Constitutionalism*, 88 MICH. L. REV. 641, 673, 720 (1990) (urging progressives to reorient their constitutional focus from the courts to the “legislative arena”). *See generally* LAWRENCE G. SAGER, JUSTICE IN PLAINCLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE (2004); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999).

<sup>61</sup> Robin West, *Katrina, the Constitution, and the Legal Question Doctrine*, 81 CHI.-KENT L. REV. 1127, 1163–72 (2006); Robin West, *The Missing Jurisprudence of the Legislated Constitution*, in THE CONSTITUTION IN 2020, at 79, 80 (Jack M. Balkin & Reva B. Siegel eds., 2009) [hereinafter West, *Missing Jurisprudence*]; Robin West, *Unenumerated Duties*, 9 U. PA. J. CONST. L. 221, 257 (2006); *see also, e.g.*, Neal Kumar Katyal, *Legislative Constitutional Interpretation*, 50 DUKE L.J. 1335, 1338 (2001) (“Congress, not the Court, is often best situated to make the judgments necessary to create a Constitution of relevance to Americans today.”); Marc Spindelman, *Toward a Progressive Perspective on Justice Ginsburg’s Constitution*, 70 OHIO ST. L.J. 1115 (2009).

<sup>62</sup> *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 847 (1992) (“It is a promise of the Constitution that there is a realm of personal liberty which the government

institutions of judicial review and supremacy, the Constitution has operated as a power in courts' hands—especially the Supreme Court's—to veto legislative action it says unconstitutionally threatens freedom by throwing this balance off.<sup>63</sup> Within this system, the status quo, unlike legislative change, typically requires no constitutional justification. Out of bounds within it, and almost impossible to imagine, is the kind of Constitution—as a vital, living document “in tune with the times”<sup>64</sup>—that progressives and some liberals dream of, mostly in political theory<sup>65</sup>: one that is more finely calibrated than the existing

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may not enter.”); West, *Missing Jurisprudence*, *supra* note 61, at 81; *see also* RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 259–66 (2004) [hereinafter BARNETT, *RESTORING THE LOST CONSTITUTION*]; Randy E. Barnett, *Justice Kennedy's Libertarian Revolution: Lawrence v. Texas*, 2003 CATO SUP. CT. REV. 21, 35–37 (discussing *Lawrence's* “presumption of liberty”); Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3, 40 (Amy Gutmann ed., 1997) (“It certainly cannot be said that a constitution naturally suggests changeability; to the contrary, its whole purpose is to prevent change—to embed certain rights in such a manner that future generations cannot readily take them away.”); *id.* at 44 (A “glaring defect of Living Constitutionalism . . . [is] its incompatibility with the whole antievolutionary purpose of a constitution[.] . . .”).

<sup>63</sup> *See* JENNIFER NEDELSKY, *PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY* 196–97 (1990). (“The Court successfully placed the very structure of government in the category of law and thus in the domain of the Court.”).

<sup>64</sup> *Griswold v. Connecticut*, 381 U.S. 479, 522 (1965) (Black, J., dissenting); *see also* *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting) (“The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound.”); *Missouri v. Holland*, 252 U.S. 416, 433 (1920) (“[W]hen we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago.”); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819) (“[The Constitution is] intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs.”); Ronald Dworkin, *A Special Supplement: The Jurisprudence of Richard Nixon*, N.Y. REV. OF BOOKS, May 4, 1972, at 27, 34–35.

<sup>65</sup> *See, e.g.*, GOODWIN LIU, PAMELA S. KARLAN & CHRISTOPHER H. SCHROEDER, *KEEPING FAITH WITH THE CONSTITUTION* 25 (2009) (“To be faithful to the Constitution is to interpret its words and to apply its principles in ways that sustain their vitality over time.”); DAVID A. STRAUSS, *THE LIVING CONSTITUTION* 3 (2010) (arguing the Constitution is a living document, a “common law constitution”); Geoffrey R. Stone & William P. Marshall, *The Framers' Constitution: Toward a Theory of Principled Constitutionalism*, AM. CONST. SOC'Y, 2 (Sept. 2011), [http://www.acslaw.org/sites/default/files/Stone\\_Marshall\\_-\\_The\\_Framers\\_Constitution\\_Issue\\_Brief\\_1.pdf](http://www.acslaw.org/sites/default/files/Stone_Marshall_-_The_Framers_Constitution_Issue_Brief_1.pdf) (“The principles enshrined in the

Constitution is to the obligation of the State not only to forbear from acting in order to protect liberty, equality, and freedom, but also sometimes affirmatively to take action in order to deliver those goods.<sup>66</sup> It is impossible to imagine the Supreme Court—at least our Supreme Court—administering a Constitution comprised of this mix of positive and negative rights and their corresponding positive and negative legislative duties.<sup>67</sup> A Congress that attempted to do so, however, would be an entirely different matter. If the Constitution were less firmly and finally in judicial hands and more regularly reposed in the legislature's, it might, just might, become the kind of Constitution that actively fulfills the obligations, both positive and negative, of a (or the) minimally decent liberal State.<sup>68</sup> Hence the idea, and ideal, of the legislated—as opposed to the adjudicated—Constitution.

Viewed against this backdrop, the new House Rule, particularly on the more ambitious reading of it, may wonderfully and productively open up the possibility of legislative constitutionalism as an actual practice. But, unfortunately, it looks to do so while carrying within it a considerable amount of the baggage of our negative Constitution. What concretely drove the new House Rule into being was a convergence of political philosophies on the political right variously dedicated to the notion that the government that governs best, promoting freedom most, legislates least.<sup>69</sup> Thus, the progressive concern

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Constitution do not change over time. But the application of those principles must evolve as society changes and as experience informs our understanding.”). See generally Charles Reich, *The Living Constitution and the Court's Role*, in HUGO BLACK AND THE SUPREME COURT 133 (Stephen Parks Strickland ed., 1967).

<sup>66</sup> See Marc Spindelman, *Death, Dying, and Domination*, 106 MICH. L. REV. 1641, 1664–67 (2008); see also Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271, 2345 (1990); Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 544 (1985); Frank I. Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 39 (1969); Jenna McNaughton, Comment, *Positive Rights in Constitutional Law: No Need to Graft, Best Not to Prune*, 3 U. PA. J. CONST. L. 750, 753, 775–81 (2001).

<sup>67</sup> Or at least a full mix of these duties. See generally David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864 (1986).

<sup>68</sup> See Robin West, *Rights, Capabilities, and the Good Society*, 69 FORDHAM L. REV. 1901 (2001) (discussing MARTHA NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT* (2000)).

<sup>69</sup> See HENRY D. THOREAU, *CIVIL DISOBEDIENCE*, in *THE PORTABLE THOREAU* 109, 109 (Carl Bode ed., Penguin Books 1982) (1849); see also Edmund Jenks, *Mitt Romney 2012: A Company Man in a Field of Mortals*, EXAMINER.COM (June 21, 2011), <http://www.examiner.com/conservative-in-los-angeles/mitt-romney-2012-a-company-man-a-field-of-mortals> (noting Mitt Romney's agreement with the attitude); John Tierney, *Palin: 'Only a Limited Government Can Provide the Best Path,'* KATU.COM (Apr. 23, 2010, 9:38 PM), <http://www.katu.com/news/91954624.html> (same, but for Sarah Palin). Political theorists often cited to support Tea Party embracement of this philosophy include LUDWIG VON MISES, *HUMAN ACTION* 281 (rev. ed. 1963) (“If, however, the government does more than protect people against violent or fraudulent aggression on the part of anti-social individuals, it reduces the sphere of the individual's freedom to act beyond the degree to which it is restricted by praxeological law.”), and F.A. HAYEK, *THE ROAD TO SERFDOM* 41–



with using this Rule as a vehicle for advancing legislative constitutionalism is, at least in part, that its deep internal logic may not be set to produce the sort of legislative constitutionalism that progressives would like to bring about, but, if anything, be set to block it.

Even more practically, it is also the case that the current political climate in the House that passed this Rule makes the possibility of producing the sort of legislated Constitution that progressives favor a pipe dream. The constitutional rules likely to be spawned under the new House Rule, if any are, seem ready to turn against progressive policies, creating new obstacles to their enactment, which would need to be faced and overcome before they ever became law. Progressive possibilities associated with a legislated Constitution that may exist in theory thus look difficult to achieve in the concrete comprised in the here and now. At this point, to launch a legislated Constitution predictably means starting the game with the ball in the progressive end zone.<sup>70</sup>

Nearly as soon as these concerns come into view, so do others, readily imagined from other points farther to the right on the political spectrum. These concerns might train their sights on what might happen to conservative politics if progressives in Congress, including in the House, were ever able to set the constitutional rules about what legislation Congress is permitted, as well as what legislation Congress is duty-bound to pass in order to discharge the obligations of the liberal State.<sup>71</sup> For those who believe that, at least since the New Deal, the federal government has gotten too big and has been allowed to get too big by the Supreme Court's unwillingness to keep Congress within its "true" constitutional bounds,<sup>72</sup> the struggle to get Congress to rein itself in and to develop the constitutional norms by which it might hold itself in check is already a hugely uphill battle, not least of all for the most ordinary sorts of

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42 (50th anniversary ed. 1994) (1944) (arguing for a limited role of government in order to protect individual rights, particularly economic liberty); *see also* LUDWIG VON MISES, *LIBERTY AND PROPERTY* 35 (2009), available at [http://mises.org/books/liberty\\_and\\_property.pdf](http://mises.org/books/liberty_and_property.pdf) ("But the fact remains that government is repression not freedom. Freedom is to be found only in the sphere in which government does not interfere. Liberty is always freedom from the government."). As Representative Michele Bachmann, founder and chairwoman of the House Tea Party Caucus, put it: "I love von Mises . . . . When I go on vacation and I lay on the beach, I bring von Mises." Stephen Moore, *The Weekend Interview with Michele Bachmann: 'On the Beach, I Bring von Mises,'* WALL ST. J., June 11, 2011, at A11; *see also* Kate Zernike, *Movement of the Moment Looks to Long-Ago Texts*, N.Y. TIMES, Oct. 2, 2010, at A9 (linking ideas current in the Tea Party to Hayek); *The Road to Serfdom*, GLENN BECK (June 8, 2010, 11:38 PM), <http://www.glennbeck.com/content/articles/article/198/41653/> (praising Hayek's *Road to Serfdom*).

<sup>70</sup> Cf. West, *supra* note 60, at 721 ("The key, of course, is to create a progressive Congress, and behind it a progressive citizenry.").

<sup>71</sup> *See id.*

<sup>72</sup> *See, e.g.,* John Samples, *Celebrating James Madison*, CATO@LIBERTY (Mar. 16, 2011, 3:46 PM), <http://www.cato-at-liberty.org/celebrating-james-madison>. *See generally* BARNETT, *RESTORING THE LOST CONSTITUTION*, *supra* note 62; RICHARD A. EPSTEIN, *HOW PROGRESSIVES REWROTE THE CONSTITUTION* (2006).

porkish political reasons.<sup>73</sup> But the climb could be made that much steeper and more treacherous in all sorts of ways, some predictable, and some less so, if what is now, formally, permissive welfare legislation were to come to be regarded as some progressives already sometimes see it: required as a matter of constitutional obligation.<sup>74</sup> Practically speaking, the politics of welfare state reform, particularly deep reform, notoriously already have this feel.<sup>75</sup> But imagine if so-called political third rails could not, even if touched, be modified because they are formally constitutional necessities, which must be provided in order to ensure the minimal conditions of a decent life.<sup>76</sup> The legislated Constitution—if it ever were in progressives' hands—could prove, from this point of view, to be simultaneously a behemoth and a disaster.

Without taking sides for the moment, the point here is that both progressives and conservatives who, in theory and principle, are either committed to or at least amenable to legislative constitutionalism for the reasons they are, may not, and certainly need not, see the prospect of its actual achievement—whether by means of the new House Rule or otherwise—with dewy or starry or forgetful eyes, as the progressives at least are sometimes accused of doing.<sup>77</sup> Nobody wishes to see one's own vision for a just constitution structurally foreclosed by legislative interpretations of our

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<sup>73</sup> See, e.g., 141 CONG. REC. S100 (daily ed. Jan. 4, 1995) (statement of Sen. McCain) (“Given Congress’ predilection for unfunded and/or pork barrel spending, omnibus spending bills, and continuing resolutions, it would seem only prudent and constitutional to provide the President with functional veto power.”); Stephen Moore, *Congress Packs More Pork than Ever in Budget Bill*, CHI. SUN-TIMES, Feb. 23, 2003, at A33.

<sup>74</sup> West, *supra* note 60, at 697 (“[Progressives believe] the state has a constitutional duty to guarantee welfare rights.”).

<sup>75</sup> Many were reminded of this by the debates surrounding Paul Ryan’s Medicare reform plans, see, e.g., Eli Saslow, *In Wis., Conflicted over the GOP Cure*, WASH. POST, Apr. 24, 2011, at A15; Jennifer Steinhauer & Carl Hulse, *Voters Attack Republicans on Medicare*, N.Y. TIMES, Apr. 27, 2011, at A1; Peter Wallsten, *GOP Feeling Heat Over Plan to Overhaul Medicare*, WASH. POST, Apr. 23, 2011, at A10, and more recently, Governor Rick Perry’s description of Social Security as a “Ponzi” scheme, see Michael Cooper & Nicholas Confessore, *Perry’s Criticism of Social Security as ‘Ponzi Scheme’ Dogs Him in Debate*, N.Y. TIMES, Sept. 13, 2011, at A18.

<sup>76</sup> See President Franklin D. Roosevelt, State of the Union Address (Jan. 11, 1944), in 13 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT: VICTORY AND THE THRESHOLD OF PEACE 32, 41–2 (Samuel I. Rosenman ed., 1950) (proposing a second bill of rights). See generally CASS R. SUNSTEIN, *THE SECOND BILL OF RIGHTS: FDR’S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER* (2004).

<sup>77</sup> See, e.g., Erwin Chemerinsky, *In Defense of Judicial Review: A Reply to Professor Kramer*, 92 CALIF. L. REV. 1013, 1018–22 (2004) (expressing concern about “the impact popular constitutionalism could have on civil rights”); Erwin Chemerinsky, *In Defense of Judicial Review: The Perils of Popular Constitutionalism*, 2004 U. ILL. L. REV. 673, 678–81 (venturing that “popular constitutionalists focus on the likelihood that other branches of the federal government will comply with the Constitution” is an “overestimation of compliance by the other two branches”). See generally Morton J. Horwitz, *A Historiography of the People Themselves and Popular Constitutionalism*, 81 CHI.-KENT L. REV. 813 (2006).

Constitution that one's philosophical or political adversaries decide. Even conservatives, who may momentarily have an upper hand in the House, might thus think twice before seizing all the opportunities provided by the new House Rule. Happily, so far, they seem not to have given it very much thought, busy with other things.

As significant as these dimensions of the larger debate about the legislated Constitution are, the eventualities they trade in are off at some distance in the future. Shorter term, there are more pressing concerns to attend. For, as the conversation about the new House Rule has been proceeding, it is becoming increasingly clear that congressional insiders are variously signaling that even a modest interpretation of the new House Rule, such as the one recommended by the CRS Report, may not be altogether successfully managed without some meaningful changes to the House's institutional culture. In a public introduction to the new House Rule, for instance, House Majority Leader Eric Cantor went out of his way to direct Members of the House to publicly available sources containing the most rudimentary information about the powers the Constitution confers upon Congress.<sup>78</sup> Similarly, the CRS Report on the new Rule provides the most fantastic cheat sheet, describing the "constitutional authority for selected types of proposed legislation,"<sup>79</sup> and (if that weren't enough) a "list of types of legislation and textual authorities."<sup>80</sup> Thinking of a bankruptcy regulation, Representative? <sup>81</sup> Go to Article I, Section 8, Clause 4. Appropriations? <sup>82</sup> See Article I, Section 9, Clause 7. Want to punish

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<sup>78</sup> *New Constitutional Authority Requirement for Legislation*, ERIC CANTOR: MAJORITY LEADER, <http://www.majorityleader.gov/CAS/> (last visited Nov. 21, 2011); see also Seth Stern, *Back to Bedrock: Republicans Turn to Tea Party's Bare-Bones Constitutionalism as Key to Reining in Federal Authority*, CQ WEEKLY, Jan. 10, 2011, at 110, 117 (Sen. Mike Lee said he knows "how hard it might be to change the culture of Congress when it comes to constitutional interpretation and views it as a long-term project." Professor Christopher W. Schmidt said the Rule "could be clogging up the system, it could be the next time a major bill is debated on the floor of Congress."); Brittany Baldwin, *Top Five Constitutional Citations of the 112th Congress*, FOUNDRY (Feb. 16, 2011, 3:00 PM), <http://blog.heritage.org/2011/02/16/top-five-constitutional-citations-of-the-112th-congress> (recording citation patterns for the first month the rule was in use); William A. Niskanen, *Cite the Constitutional Authority or the Lack Thereof!*, CATO@LIBERTY (Jan. 20, 2011, 3:12 PM), <http://www.cato-at-liberty.org/cite-the-constitutional-authority-or-the-lack-thereof>; Ilya Shapiro, *2011: Year of the Constitution*, CATO@LIBERTY (Jan. 4, 2011, 9:12 AM), <http://www.cato-at-liberty.org/2011-year-of-the-constitution>; Ilya Shapiro, *Citing the Constitution*, CATO@LIBERTY (Jan. 5, 2011, 10:21 AM), <http://www.cato-at-liberty.org/citing-the-constitution> ("Congress will actually be debating whether it has the authority to do something! Kickin' it 19th-century style! The Congressional Record might now be as interesting reading as the transcripts of Supreme Court arguments, but more so because the debates there will almost certainly be less abstruse and designed to appeal to (and satisfy) constituents.").

<sup>79</sup> THOMAS & TATELMAN, *supra* note 2, at 4–7.

<sup>80</sup> *Id.* at 7–19.

<sup>81</sup> *Id.* at 7.

<sup>82</sup> *Id.*

counterfeiters, Congressman?<sup>83</sup> Check out Article I, Section 8, Clause 6. Among the most interesting—and painfully telling—sections is the one on Civil Rights Enforcement that contains a reference to Section 5 of the Fourteenth Amendment legislation and nothing more.<sup>84</sup> For all the other references to it in the CRS Report, there is no appearance here of the Commerce Clause.<sup>85</sup>

No small aside, these predictions about actual practice with the new House Rule ring right. Although members of the House have generally been doing a respectable job with the new House Rule, some of the sources some of them have been citing as authority for Congress's powers—including the Preamble to the Constitution,<sup>86</sup> the First Amendment,<sup>87</sup> or like it, the Ninth<sup>88</sup>—suggest that the schooling in the CRS Report, though rudimentary, could productively fall on more attentive ears.

More to the point, what all these texts, taken together, suggest is that members of the House, if not members of Congress more generally, are being imagined—in important ways or important numbers or both—to lack a certain fluency in constitutional thinking. This may well be an important dimension of James Bradley Thayer's predictions about the effects of judicial review on legislative and political deliberations come true.<sup>89</sup> But whether it is or not, if

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<sup>83</sup> *Id.* at 9.

<sup>84</sup> *Id.* at 8.

<sup>85</sup> This, in a way, confirms a lesson learned in *United States v. Morrison*, 529 U.S. 598 (2000).

<sup>86</sup> See 157 CONG. REC. H1363 (daily ed. Feb. 18, 2011) (statement of Rep. Kucinich); *id.* at H5374 (daily ed. July 21, 2011) (statement of Rep. Wolf).

<sup>87</sup> See *id.* at H511 (daily ed. Jan. 26, 2011) (statement of Rep. Deutch); *id.* at H6139 (daily ed. Sept. 13, 2011) (statement of Rep. Paul).

<sup>88</sup> See *id.* at H3219 (daily ed. May 11, 2011) (statement of Rep. Paul) (“Congress has the power to enact this legislation [H.R. 1831] pursuant to the following: This act is justified by the Commerce Clause of the United States Constitution that, by granting Congress the power to regulate commerce among the several states, allows Congress to prevent the federal government from interfering in Americans’ ability to grow and process industrial hemp and by the Ninth Amendment and Tenth Amendment of the United States Constitution that recognizes that rights and powers are retained and reserved by the people and the states.”).

<sup>89</sup> Thayer observed:

The legislatures are growing accustomed to this distrust, and more and more readily incline to justify it, and to shed the consideration of constitutional restraints,—certainly as concerning the exact extent of these restrictions,—turning that subject over to the courts; and, what is worse, they insensibly fall into a habit of assuming that whatever they can constitutionally do they may do,—as if honor and fair dealing and common honesty were not relevant to their inquiries.

The people, all this while, become careless as to whom they send to the legislature; too often they cheerfully vote for men whom they would not trust with an important private affair, and when these unfit persons are found to pass foolish and bad laws, and the courts step in and disregard them, the people are glad that these few wiser gentlemen on the bench are so ready to protect them against their more immediate representatives.

these troubles are being foreshadowed and registered in relation to a modest interpretation of the new House Rule, one can only imagine how institutionally ill-suited the House presently would be to satisfy the challenges of a broader and more ambitious interpretation of it. No matter how much one might like either in principle or in theory or just on a better reading of Rule's text, given the impetus for it, to see that interpretation of the Rule be the one the members of the House abide.

To recognize that there is a constitutional fluency deficit in the U.S. House of Representatives is not, of course, to say that constitutional conversations in the House or Congress, more generally, cannot and do not happen, or when they do, fly as high as constitutional conversations need to go. There are, to begin and perhaps most obviously, those debates on issues that fall under the general heading of "political questions"<sup>90</sup> in which Congress is charged with

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... Great and, indeed, inestimable as are the advantages in a popular government of this conservative influence,—the power of the judiciary to disregard unconstitutional legislation,—it should be remembered that the exercise of it, even when unavoidable, is always attended with a serious evil, namely, that the correction of legislative mistakes comes from the outside, and the people thus lose the political experience, and the moral education and stimulus that come from fighting the question out in the ordinary way, and correcting their own errors. . . .

The tendency of a common and easy resort to this great function, now lamentably too common, is to dwarf the political capacity of the people, and to deaden its sense of moral responsibility. It is no light thing to do that.

JAMES BRADLEY THAYER, JOHN MARSHALL 103–07 (1901), *discussed in* BICKEL, *supra* note 52, at 21–22; *see also* James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 155–56 (1893) (observing how judicial review can sap legislative duty of its commitment to constitutionalism and what it requires).

<sup>90</sup>*See, e.g.,* United States v. Nixon, 418 U.S. 683, 692–97 (1974); BICKEL, *supra* note 52, at 184 (outlining foundations of the political-questions doctrine); Alexander M. Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 46 (1961); Erwin Chemerinsky, *Bush v. Gore Was Not Justiciable*, 76 NOTRE DAME L. REV. 1093, 1105–09 (2001); Fritz W. Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517, 567 (1966). For constitutional conversations in Congress generally, *see* DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789–1801* (1997); DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE JEFFERSONIANS, 1801–1829* (2001); DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: DEMOCRATS AND WHIGS, 1829–1861* (2005); DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: DESCENT INTO THE MAELSTROM, 1829–1861* (2005); REBECCA E. ZIETLOW, *ENFORCING EQUALITY: CONGRESS, THE CONSTITUTION, AND THE PROTECTION OF INDIVIDUAL RIGHTS* (2006); Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955) (tracing the original understanding of the Fourteenth Amendment). For an illustration of a legislative constitutional conversation at the state level, *see* the floor debate in the Ohio House of Representatives on new voter identification legislation, Am. Sub. H.B. 194, 129th Gen. Assemb. (Ohio 2011). *House Session—May 18, 2011* (The Ohio Channel television broadcast May 18, 2011), *available at*

interpreting and implementing the commands of the Constitution, as it did in the impeachment and trial of President William J. Clinton.<sup>91</sup> No less importantly are those debates that, even when not themselves expressly framed as constitutional deliberations, and one might think here of some of the debates surrounding the Affordable Care Act<sup>92</sup> or the federal partial birth abortion ban ultimately upheld by the Supreme Court in *Gonzalez v. Carhart*,<sup>93</sup> may be constructively understood in those terms.<sup>94</sup> As famously in their way, though not in the House, are the exchanges on fine points in constitutional law that can and do happen during judicial confirmation hearings in the Senate. Summed up, it is appropriate to observe that, both historically and contemporaneously, grand constitutional debates have taken place on Congress's floors.<sup>95</sup> These moments to the contrary notwithstanding, it is also true that in the ordinary course of its legislative business these days, when Congress considers the constitutionality of proposed legislation, it is typically less focused on reaching its own considered judgment about the meaning of the Constitution than on collecting and sorting through the opinions of outside experts whose focus is typically on predicting what courts—and in particular the Supreme Court—will make of a particular piece of legislation, if passed.<sup>96</sup> When, that is, Congress engages the constitutionality of its proposed measures as part of its deliberations at all.

And so it must be recognized that the existence and operation of a constitutional fluency deficit in the House of Representatives supplies yet another reason—sounding in what might loosely be described as institutional culture—that recommends not the broader, but the narrower interpretation of the new House Rule offered in the CRS Report. Along with the other

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<http://www.ohiochannel.org/MediaLibrary/Media.aspx?fileId=131009>, at 39:57; *House Session—June 29, 2011* (The Ohio Channel television broadcast June 29, 2011), available at <http://www.ohiochannel.org/MediaLibrary/Media.aspx?fileId=131914>, at 180:30.

<sup>91</sup> For sources on the Clinton impeachment, see H.R. Res. 611, 105th Cong. (as passed by House, Dec. 19, 1998) (articles of impeachment against President Clinton); 145 CONG. REC. S1458–59 (daily ed. Feb. 12, 1999) (statement of the Chief Justice) (announcing acquittal of President Clinton of the charges in the articles of impeachment). For additional sources on impeachment, more generally, see RAOUL BERGER, *IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS* 103–21 (1973); CHARLES L. BLACK, JR., *IMPEACHMENT: A HANDBOOK* 53–63 (1974), and see also William H. Rehnquist, *Political Battles for Judicial Independence*, 50 WASH. L. REV. 835, 836–42 (1975), for a discussion of impeachment as a congressional mechanism for making “unwritten constitutional law.”

<sup>92</sup> Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

<sup>93</sup> 550 U.S. 124 (2007).

<sup>94</sup> David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 925 (1996). See generally Simon Lazarus, *Hertz or Avis? Progressives' Quest to Reclaim the Constitution and the Courts*, 72 OHIO ST. L.J. 1201 (2011); Rebecca E. Zietlow, *Democratic Constitutionalism and the Affordable Care Act*, 72 OHIO ST. L.J. 1367 (2011).

<sup>95</sup> See *supra* notes 57, 90–91.

<sup>96</sup> This is partly in the absence of the availability of constitutional advisory opinions from the courts. See ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* 48–49 (3d ed. 1999) (discussing the constitutional prohibition against advisory opinions).

considerations to be counted in its favor, the case for this reading of the new House Rule appears comparatively decisive—for now. The House's institutional culture, at least at this point in time, does not look to be able to handle with any high degree of consistency and ease much, if anything, more than the narrow reading of the Rule the CRS Report provides.

To be sure, this is a current descriptive fact about the House's institutional culture that must be registered and given heed, not anything to be touted as a point of pride and ignored. One need not be either a progressive or a conservative proponent of redistributing constitutional authority away from the courts, and in particular the Supreme Court, to appreciate this. The present situation should be taken as reason for concern for anyone who appreciates that the House of Representatives, as part of Congress, has independent constitutional responsibilities. But concern or no, changes to the House's institutional culture are and would be required effectively to sustain a more ambitious reading of the new House Rule.

Still, this does not quite end the matter. The good news is that the new House Rule, even on a narrow reading of it, may yet serve to provide members of the House with practice in openly thinking with and about constitutional norms in ways that may begin to fill in, and start to cure, the House's constitutional literacy gap.<sup>97</sup> It is much too soon to tell, but, with time, the new House Rule might begin to produce just the sorts of changes in congressional culture that are an institutional precondition for the effective functioning of a broader understanding of the House Rule, with all the benefits that that could eventually bring. It is imaginable that, with time, for instance, practice with a narrow reading of the new House Rule could provide a foundation for a new sense within the institution (and maybe outside of it), indeed, maybe within Congress as a whole, that there is both reason and need for its members to develop deeper and broader understandings of the Constitution and constitutional interpretation—in the direction of Congress becoming what, in theory, it already may be seen to be: not only a co-equal branch of the federal government, but a co-equal interpreter of the federal Constitution, if not more.

Who can say with certainty what might happen along the way or follow as a result of that? Speculatively: If constitutional interpretation in the House, and maybe Congress as a whole, started out in its present form, aiming to predict how courts will exercise their powers of judicial review, a small and subtle—but important—shift could well be brought about, according to which legislative deliberation about the Constitution's meaning could become a means by which legislators sort out for themselves the implications of existing constitutional doctrines, including those handed down by the Supreme Court. From there, new methods of constitutional interpretation, different from those that have been thought to be amenable to use by an unelected judiciary, might begin to emerge. What might start out as legislative deliberations about constitutional meaning,

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<sup>97</sup> See BICKEL, *supra* note 52, at 26 (“[Principled decision making] calls for a habit of mind, and for undeviating institutional customs.”).

including the meaning of doctrines handed down by the Supreme Court, that look and sound just like the deliberations that have long been taking place in the courts, could, over time, cease tracking existing judicial interpretive modes. Text, history, structure, tradition, precedent, and principled neutrality, along with other widely accepted sources of constitutional interpretation, all might well continue to matter, informing legislative judgments about the meaning of various constitutional provisions. But, in legislative hands, these sources of judgment could be woven together with reason in all sorts of different ways, amounting to something new—new styles and forms of acceptable and persuasive constitutional argument.<sup>98</sup> Improvements in constitutional literacy in the House and perhaps Congress, as a whole, might, in other words, produce an importantly, if not also an entirely, new language of and for constitutional deliberation.<sup>99</sup>

To notice these possibilities—and they are, of course, for the moment only that—is not necessarily to make an affirmative argument for the development of new interpretive methodologies as part of a practice of legislative constitutionalism. At least not yet. Rather, what it is, is an invitation to recognize and imagine what sorts of constitutional reforms, at the level of constitutional method, could be in the offing in the wake of practice with the new House Rule.

Far short of these possibilities, for now, the new House Rule, even on the narrow interpretation of it found in the CRS Report and the weight of actual practice with it in the House, may be recognized as doing something that may prove to be quite significant. Through engagement with the Constitution and constitutional deliberation of the sort that the new House Rule calls for, members of the House may come to share, whatever their political affiliations, a political desire for full fluency and literacy in constitutional deliberation and debate. Following and flowering from that desire could well come a desire to change the institutional culture of the House, and the wider political culture, which has for so long left the Constitution so firmly and finally in the hands of the courts. In saying this, it is important not to confuse a desire for change with change itself. Institutional change—particularly changing an institution's culture—is notoriously hard.<sup>100</sup> Existing institutional cultures, particularly of

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<sup>98</sup> For a delightful example of what these methods could look like, see Adrienne D. Davis, *Slavery as Gender Supremacy: Reflections on Justice Ginsburg's Jurisprudence and a Contemporary Theory of Reproductive Rights* (Apr. 10, 2009) (unpublished manuscript) (on file with author).

<sup>99</sup> Intersecting these ideas is A. Daniel Oliver-Lalana, Foreword, *Towards a Theory of Legislative Argument*, 4 LEGISPRUDENCE 3 (2010); Jan Sieckmann, *Legislative Argumentation and Democratic Legitimation*, 4 LEGISPRUDENCE 69 (2010).

<sup>100</sup> Useful points are found in Amy J. Cohen, *Thinking with Culture in Law and Development*, 57 BUFF. L. REV. 511 (2009); Mark Tushnet, *Some Observations on Legislative Capacity in Constitutional Interpretation*, 2 LEGISPRUDENCE 163 (2008). Additional pertinent discussion is in Amy J. Cohen & Michal Alberstein, *Progressive Constitutionalism and Alternative Movements in Law*, 72 OHIO ST. L.J. 1083 (2011).



institutions with scales like the House of Representatives, are extraordinarily complex, and altered, when they are, often only slowly and against the gravitational force of inertia and well-settled ways of doing business, and only in the presence of tremendous dedication and effort and consensus.<sup>101</sup> Even preconditions like broad consensus, when they exist, are not always enough to get the job done. And, in any case, quite significantly, the House of Representatives is not anywhere near that point where the sorts of changes that would accompany the House playing a larger and more significant role in constitutional interpretation are possible because wanted. All of this, then, is really only to say what one can: The new House Rule is a sign, but only a small sign, of the chance for change. It puts on display a sense that the House, and maybe Congress as a whole, could and should be taking the Constitution and constitutional interpretation much more seriously than it has been in recent years. If only dimly, it suggests the prospects of—and, importantly, a mechanism or an occasion for—re-imagining constitutional dialogue being conducted with the courts. If the desires behind it are attended to, not ignored, not snuffed out, but joined, and joined across the political board, the prospects could be small or they could be stunningly big. The new House Rule, on a modest interpretation of it, one that the House is already attempting to handle today, might turn out, in the course of time, with the right recognition of what it could be aiming toward, to have yielded a new future and a new course for the Constitution and our country that proponents of the measure might not have expected, but which, if and when these eventualities transpire, they should be justly proud for helping to have brought about.

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<sup>101</sup> And not only that, but coordination with the remainder of the Congress, and some perhaps also with the other branches, see Conrado H. Mendes, *Neither Dialogue Nor Last Word: Deliberative Separation of Powers III*, 5 LEGISPRUDENCE 1 (2011), and support in political culture writ large, as well.

